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Sent via E-Mail to ofccp-public@dol.gov
And U.S. Mail, First Class

Mr. Joseph DuBray, Jr.
Director, Division of Policy,
Planning and Program Development
U. S. Department of Labor
Office of Federal Contract Compliance Programs
Room C-3325
Washington, DC 20210

Re: Comments on Proposed Regulations Amending 41 CFR Part 60-1

Dear Mr. DuBray:

This letter is in response to the invitation by the Office of Federal Contract Compliance Programs ("OFCCP") to submit written comments on proposed amendments to 41 CFR Part 60-1. The proposal was published at 69 F.R. 16446 (March 29, 2004). I am submitting these comments on behalf of our client, the National Association of Manufacturers ("The NAM").

The NAM has also submitted comments to the Equal Employment Opportunity Commission on the proposed Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures ("UGESP") as They Relate to the Internet and Related Technologies, 69 F.R. 10152 (March 4, 2004). Because the issues and concerns relating to the proposed Questions and Answers and OFCCP's proposed regulation published are intertwined, our comments on both notices are set forth below.

The NAM is committed to protecting the interests of its membership and, accordingly, submits these comments in an effort to increase the UGESPs Agencies' understanding of The NAM's member needs. These comments are intended to assist OFCCP and the UGESPs agencies in crafting final regulations and final Questions and Answers that promote the purpose of the Uniform Guidelines and, at the same time, respond to legitimate employer concerns about the difficulties of applying the proposals.

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OFCCP
U.S. DEPT. OF LABOR
WASHINGTON, D.C. 20210

The NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all fifty states. Headquartered in Washington, D.C., The NAM has ten additional offices across the country. The NAM's mission is to enhance the competitiveness of manufacturers and to improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the importance of manufacturing to America's economic strength.

The NAM commends OFCCP and the other UGESP agencies for recognizing that the exponential expansion of the Internet and related electronic data processing technologies requires the agencies to provide guidance on application of the Uniform Guidelines to these technologies as they relate to recruitment and hiring and new employees. The NAM appreciates this opportunity to express our concerns about particular aspects of the proposed regulations.

The Introduction to the UGESP Agencies' proposed Questions and Answers explicitly stated that "[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities." 69 F.R. 10153 (March 4, 2004). Accordingly, OFCCP has promulgated proposed regulations that would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes to conform to the new interpretive guidance promulgated by the UGESP agencies. 69 F.R. 16446 (March 29, 2004).

COMMENTS ON OFCCP REGULATORY PROPOSAL

Definition of "Internet Applicant" (proposed § 60-1.3)

As discussed more fully below, The NAM agrees with OFCCP's proposed definition.

Record Retention (proposed 41 CFR §60-1.12)

The proposal would require employers/federal contractors to retain "any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CFR 60-1.3) . . ." This would place an enormous recordkeeping burden on employers. Employers would have to retain unsolicited resumes received via email, even if the employer follows a uniform policy of not considering unsolicited resumes. Employers who search a resume database would have

to obtain a copy of all the resumes that were in the database at the moment of the search. Each search would require a new “snapshot” to be taken of the resumes in the database, since the contents of such databases typically are in constant flux. This could mean that the employer is obligated to retain electronic copies of hundreds of thousands or even millions of resumes. Even though these records are electronic, the recordkeeping burden of saving such a large volume of data would be enormous.

Moreover, this requirement contradicts the UGESP proposed guidance, which does not consider people who send in unsolicited resumes over the Internet to be “applicants.” See examples provided in Q & A 96, 69 F.R. at 10155-56.

Instead, The NAM recommends that the final regulations require employers to retain records of all applications from individuals who meet the definition of an “Internet Applicant.” We also believe it would be reasonable to require employers who use a resume database to retain a record identifying the particular database that was used, the specific search terms, and the dates of the searches. This would provide a balance between the OFCCP’s desire to determine if the employer used improper search terms and the employer’s need to have a reasonable record-keeping standard.

COMMENTS ON UGESP AGENCIES’ ADOPTION OF ADDITIONAL QUESTIONS AND ANSWERS

Application of federal employment nondiscrimination laws to employers when they use the Internet and related technologies (Q&A 94)

The NAM agrees with the proposed Q&A.

Exemption for Internet recruitment (Q&A 95)

The NAM agrees that UGESP requirements do not apply to recruitment, whether conducted by traditional means or through the Internet and related technologies.

Criteria for determining who is an “applicant” (Q&A 96)

The NAM very much appreciates the UGESP Agencies’ effort to craft a definition of an “Internet applicant” in order to provide employers guidance in meeting their equal employment opportunity, affirmative action and recordkeeping obligations. We agree with the three criteria set forth in the proposal and the explanations and examples provided. Our most significant concern, however, is the omission of a requirement that candidates meet the advertised, basic qualifications for the position to be an “applicant,” and the resulting potential dual standard that thus appears to have been created between

the proposed UGESP Questions and Answers (“Qs & As”) and OFCCP’s proposed regulation.

Specifically, we are concerned that while OFCCP’s proposed regulation excludes from the definition of “applicant” those individuals who do not meet the employer’s “advertised, basic qualifications for the position” (proposed 41 C.F.R. § 60-1.3(1)(iii), 69 F.R. 16449), the UGESP Qs & As do not include this provision, although some of the examples suggest that such advertised, basic qualifications must be met.¹ We appreciate the format of the UGESP Qs & As in that they provide a range of specific examples. We would like to see this general format continued if the UGESP Qs & As are modified before becoming final.

We believe the explanations that are provided and the results that are reached in each of the UGESP Qs & As examples make sense and are reasonable. But we are concerned that employers who also are federal contractors may be held to one standard for purposes of EEOC’s enforcement of Title VII, and another standard for purposes of OFCCP’s enforcement of Executive Order 11246. If there were such a dual standard, recordkeeping would be impossibly difficult for employers/contractors. We believe it is essential, therefore, to have a uniform definition of “Internet applicant.”

The UGESP Qs & As were promulgated by the four UGESP agencies. These agencies explicitly stated in the Introduction to the Qs & As that “[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities.” 69 F.R. 10153 (March 4, 2004).

We urge the UGESP agencies to acknowledge in the final document that the OFCCP’s proposed definition of “applicant” is consistent with the UGESP guidelines. This would clarify employers’ responsibilities and eliminate a potential source of confusion and difficulty.

Employers’ Processing of Large Numbers of Applications

One issue that is not addressed is the situation where an employer advertises a job and is unexpectedly inundated with far more applicants than the employer has the staff to evaluate. In this situation, we would like to propose two alternative solutions. First, an employer could establish a specified “first-come, first-served” numerical limit on the number of applications that would be considered (*e.g.*, the first 100 applicants). Second, the employer could select a sample from the pool, using a uniform, objective and nondiscriminatory standard (*e.g.*, review every fifth application, sorted by arrival time of

¹ See, *e.g.*, Q&A 96, Example “A,” 69 F.R. at 10155 (candidates must be willing and available to work in a particular geographic area where vacancies exist); Q&A 96, Example “B,” *id.* (job seeker must show relevant work experience); and Q&A 97, Example “C,” *id.* (candidates who do not have requisite years of experience may be excluded from applicant pool).

the application or by first or last name). Only those individuals considered using one of these alternatives, or a similar selection system, would be applicants.

Applicability of UGESP to employment tests (Q&A 98)

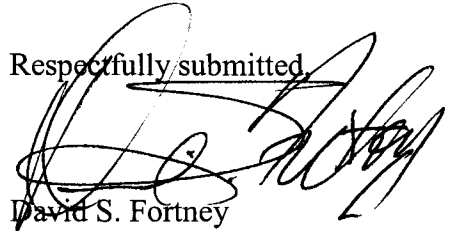
The principle of applying disparate impact standards to on-line tests in the same manner they are applied to paper tests is reasonable.

CONCLUSION

The NAM appreciates the efforts of OFFCP and the other UGESP agencies to apply the Uniform Guidelines to new technologies. We hope the agencies will take our concerns into account in fashioning the final Questions and Answers and regulations.

The NAM's Director of Employment Policy, Christopher Tampo; the NAM's Vice President of Human Resources Policy Sandra J. Boyd, Esq.; as well as the undersigned, would be happy to provide any additional information that would be of help in the issuance of final Questions and Answers and regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David S. Fortney", is written over the words "Respectfully submitted,".

David S. Fortney
Counsel for
The National Association of Manufacturers

DSF/ch

cc: Mr. Christopher Tampo
Director of Employment Policy
The National Association of Manufacturers

Sandra J. Boyd, Esq.
Vice President, Human Resources Policy
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